



September 12, 2005

SUBMITTED VIA EDOCKET

OAR Docket ID Number OAR-2004-0094
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Comments of the Cement Kiln Recycling Coalition on National Emission Standards for Hazardous Air Pollutant; General Provisions: Notice of Reconsideration of Final Rule: Proposed Amendments; Request for Public Comment, Docket No. OAR-2004-0094, 70 Fed. Reg. 43992 (July 29, 2005)

The Cement Kiln Recycling Coalition (CKRC) respectfully submits these comments on the U.S. Environmental Protection Agency's (EPA's or the Agency's) above-referenced notice of public comment. CKRC is a Washington, D.C.-based trade association representing cement companies engaged in the use of materials burned for energy recovery, as well as companies involved in the collection, processing, management, and marketing of certain such materials for use in cement kilns.

Sincerely,

A handwritten signature in black ink, appearing to read "Michel R. Benoit", written in a cursive style.

Michel R. Benoit
Executive Director

CC: Rick Colyer, OAQPS

Comments of the Cement Kiln Recycling Coalition on National Emission Standards for Hazardous Air Pollutant ; General Provisions: Notice of Reconsideration of Final Rule: Proposed Amendments; Request for Public Comment

Docket No. OAR-2004-0094, 70 Fed. Reg. 43992 (July 29, 2005)

The Cement Kiln Recycling Coalition (CKRC) respectfully submits these comments on the U.S. Environmental Protection Agency's (EPA's or the Agency's) above-referenced "notice of reconsideration of final rule, proposed amendments, and request for comment" (July 29 Proposal). CKRC is a Washington, D.C.-based trade association representing cement companies engaged in the use of materials burned for energy recovery, as well as companies involved in the collection, processing, management, and marketing of certain such materials for use in cement kilns.

Cement kilns that burn waste-derived materials perform an important and necessary role in our nation's waste management system by recovering energy from wastes that would otherwise be burned merely for destruction. The energy-bearing materials are used as a fuel supplement to manufacture cement, at the same time that the waste is managed in a manner protective of human health and the environment.

The July 29 Proposal would amend the startup, shutdown, malfunction (SSM) provisions in Clean Air Act (CAA) §112 "General Provisions" (found at 40 CFR part 63, subpart A¹). In addition, it would amend the hazardous waste combustor (HWC) maximum achievable control technology (MACT) standard regulations codified at part 63, subpart EEE. CKRC members that burn hazardous waste in cement kilns must comply with these standards. Thus, CKRC has a direct interest in this notice and rulemaking.

As explained in more detail below, CKRC supports EPA's proposal to amend MACT standard language so that facilities are required to follow the general duty provision but are not required to implement their SSM plans when an SSM event occurs. We believe, however, that EPA can make technical improvements to its proposed regulatory amendments language. In addition, while it may be impossible to state that a facility's compliance with any SSM plan whatsoever serves as a "safe harbor" from a noncompliance finding, EPA can clarify that the carrying out of an SSM plan written in good faith would provide such a safe harbor, or at least would mitigate a finding of noncompliance so as to reduce the remedy to only amending the plan itself. Finally, we concur with EPA that the CAA does not require, and EPA's rules should not mandate, that EPA or a permitting authority obtain an SSM plan from a facility upon the request of a member of the public.

Requirements During an SSM Event

EPA is correct in stating that "[e]stablishing the specific procedures in SSM plans as applicable requirements may unnecessarily constrain a source during a period where unanticipated events call for maximum flexibility" (p. 43993, col. 3). As the July 29

¹ Unless otherwise specified, all regulatory references in these comments are to 40 CFR.

Proposal points out, the appropriate requirement during a period of SSM is a general duty to minimize emissions consistent with safety and good air pollution control practices (*id.* at col. 2). Thus, EPA is right to say that the elements of an SSM plan are not “applicable requirements” and therefore a decision not to implement the plan during an SSM event does not by itself amount to a CAA violation.

Although CKRC agrees with EPA’s intent in proposing the rule changes, we offer improvements to the actual language for amending the relevant provisions of the subpart EEE regulations (and similarly worded proposed language for amending other MACT rules). Currently, §63.1206(c)(2)(v)(A)(2) and (B)(4) state that during an SSM event a facility will not be in violation of the HWC MACT standards even though it exceeds an emissions limit, as long as it follows the corrective measures and operating procedures prescribed in the SSM plan. The July 29 Proposal appropriately would replace this reference to following the measures and procedures in the SSM plan to a reference to the section of the part 63 “General Provisions” that requires facilities to minimize emissions consistent with safety and good air pollution control practices.

The proposed regulatory reference is too broad, however; the proposed provisions would require the facility to take the corrective measures and operate in accordance with §63.6(e). See proposed provisions at p. 44000, col. 3. While the discussion in the preamble clearly indicates that EPA is contemplating only a following of the “general duty” to minimize emissions consistent with safety and good air pollution control practices, §63.6(e) in fact contains other requirements as well. For example, §63.6(e)(1)(iii) describes other operation and maintenance requirements, and §63.6(e)(3) requires the development of an SSM plan. EPA should replace the two overly broad references to the entire paragraph of §63.6(e) (references found in §63.1206(c)(2)(v)(A)(2) and (B)(4) to §63.6(e)) with more tailored references to §63.6(e)(1) (i) and (ii). It is §63.6(e)(1)(i) and (ii) that contain the general duty to minimize emissions consistent with safety and good air pollution control practices.

Effect of Complying With an SSM Plan

The July 29 Proposal states that following the SSM plan during an SSM event “is no “safe harbor” for sources if the plan is found to be deficient. That is, a source could not use ‘following the plan’ as a defense for an inadequate program to minimize emissions” (p. 43994, col. 1). We agree that following an obviously faulty SSM plan should not serve as a “shield” from enforcement. Nevertheless, while (as described in the preceding section), it is not appropriate to require compliance with an SSM plan, following such a plan *should* provide a safe harbor *if* it is not obviously deficient. In other words, a plan designed and written in good faith after careful consideration serves as a useful guide for the facility, and thus for enforcement purposes EPA and state agencies should not engage in post-hoc analysis of whether the plan covered every conceivable event adequately. If the intent of a reasonable plan was to minimize emissions during an SSM event, and the facility followed the plan, then no enforcement action should be brought even if emissions were not in fact minimized. The remedy in this case would be to have the facility amend its SSM plan to address any newly discovered circumstances.

Availability of SSM Plans

We agree with EPA's conclusion that "the CAA does not require EPA or a permitting authority to obtain SSM plans at the request of the public. Nor does the CAA provide EPA with authority to impose such a requirement on permitting authorities" (p. 43995, col. 1).

In addition, such a requirement would amount to bad policy. SSM plans describe the internal operations of plants that must compete in the marketplace. As result, the plans often contain confidential and sensitive information. Even if the CAA provided authority to give a member of the public the right to obtain an SSM plan, providing such a right would allow companies to obtain sensitive information from their competitors. To protect themselves from this type of unacceptable outcome, many facilities no doubt would write overly vague SSM plans and omit critical information. That, in turn, would make the SSM plans much less useful to plant personnel, and the result could be poorer engineering and environmental performance during an SSM event. It would make no sense to write the rules in a way that could lead to this result. CKRC therefore supports EPA's proposal to remove the provision in §63.6(e)(3)(v) that requires a permitting authority to obtain an SSM plan under certain conditions.